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In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1962

Case No. 717.

LYNCHBURG TRAFFIC BUREAU (Corp.),
Petitioner,

v.

SMITH'S TRANSFER CORPORATION
OF STAUNTON, VA.,
Respondent.

PETITION OF PETITIONER FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI

W. G. BURNETTE,
Lynchburg, Virginia.
Counsel

INDEX

Page

Statement 1

Was An Order Issued? 3

Which Controls? The Statutory Provision or the Decision in the T I M E Case? 4

Certificate of Counsel 7

Certificate of Service 7

CITATIONS

T I M E, Inc. v. U.S., 359 U.S. 464 2

Lynchburg Traffic Bureau v. Smith's Transfer Corporation of Staunton, Va., 310 I.C.C. 503(504) 3

Dry Goods, Piece Goods, Dependent Upon Value, 53 M.C.C. 157 4

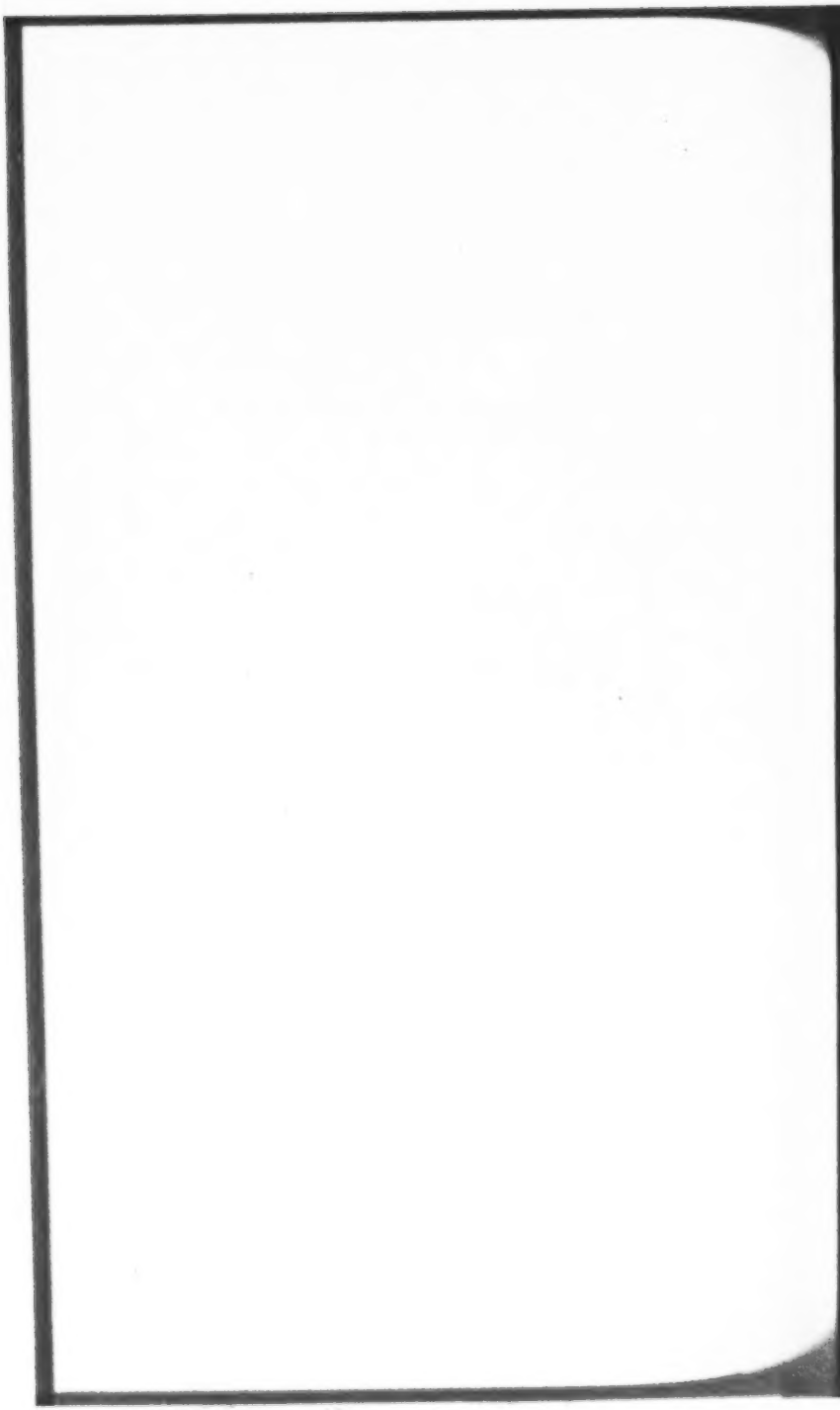
STATUTES

28 U.S.C. 1336 6

49 U.S.C. 8 5

49 U.S.C. 16(12) 5

49 U.S.C. 305(g) 5



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STATEMENT

Petitioner, in support of this petition for rehearing respectfully directs attention to the statutory provisions allowing petitioner the right to have an order of the Interstate Commerce Commission enforced and allowing petitioner the right to recover damage for the failure of respondent to obey such an order of the Commission.

Back in 1958, when the complaint was filed with the

Interstate Commerce Commission seeking a determination of lawful charges and when action was instituted in the District Court to recover damages for the exaction of unlawful rates and charges, the law and practice was to first institute suit in the District Court for damage and then to file a formal complaint with the Interstate Commerce Commission for determination of lawful rates and charges. After the Commission had determined past unlawfulness, then petitioner was to pursue the action in Court for damage.

After both the action in Court and the complaint before the Commission were filed and before the Commission rendered its decision in the complaint case, this Honorable Court, by the decision in the T I M E Case, 359 U.S. 464, changed the whole scheme of relief heretofore adopted and, for that reason, the complaint case before the Commission was not decided, as the Commission said:

> "In view of the decision in T I M E, Inc. v. United States, 359 U.S. 464, our determination herein concerning the ratings applied and rates charges on past shipments will be restricted to the issues of applicability" (See Lynchburg Traffic Bureau v. Smith's Transfer Corporation of Staunton, Va., 301 I.C.C. 503(504)).

Almost immediately after the T I M E decision was released, respondent filed a motion to dismiss this action in light of that decision. The motion was sustained and from that day to the present day, the issue of the right of petitioner to have the order of the Interstate Commerce Commission in 53 M.C.C. 157 enforced and damages awarded have never been determined and that right is

what petitioner is here seeking to have granted. The Interstate Commerce Commission, in speaking of whether or not the Commission found the valuation charge unjust and unreasonable and issued an order requiring respondent to cancel the aforesaid valuation charge, said:

> "In 1951, released ratings and penalty ratings on dry goods, finished or unfinished, * were considered in Dry Goods, Piece Goods, Dependent on Value, 53 M.C.C. 157. Therein, Division 3 found released ratings and penalty ratings on such traffic moving between points in Middle Atlantic Territory * unjust and unreasonable and their cancellation was required" Lynchburg Traffic Bureau v. Smith, 310 I.C.C. 503(505).

It is thus clear that the valuation charge was declared, in 1951, to be unjust and unreasonable and respondent was required by an order of the Interstate Commerce Commission to cancel the aforesaid valuation charge. Respondent did not comply with that order but collected from petitioner those unlawful charges.

WAS AN ORDER ISSUED?

The first thing to determine is whether or not the Interstate Commerce Commission, in 1951, issued an order requiring respondent to cancel from its tariffs a provision imposing a valuation charge[1] on shipments of dry goods

[1] A valuation charge is a charge respondent imposes over and above the regular rate and charge made for releasing the liability of respondent in case of loss or damage to shipments of dry goods and clothing to the value declared. The valuation charge on petitioner's shipments was equal to 20 cents per 100 pounds.

and clothing, and if the order was issued and not complied with, what rights, if any, did petitioner have under statutory provisions.

The order was issued, as the Interstate Commerce Commission on July 27, 1951, issued an order requiring respondent to cancel the said valuation charge from its tariff. The order, in part, read:

> "It is ordered, that the defendants (including Smith) in MC-C-1019 be, and they are hereby, notified and required to cancel the assailed ratings and provisions (on dry goods and clothing authorizing a valuation charge) on or before September 10, 1951" (see Plaintiff's Exhibit E which was reproduced in brief to Court of Appeals and in Appendix to this Court).

The respondent did not comply with that order and proof of that fact is found in the complaint in this suit. The fact that petitioner is here seeking to recover the charges which respondent collected from petitioner contrary to an order of the Commission is proof that respondent did not comply with the order.

WHICH CONTROLS? THE STATUTORY PROVISION OR THE DECISION IN THE T I M E CASE?

The next question is: does the T I M E Case prevent recovery of the valuation charges which respondent collected contrary to a decision and order the Interstate Commerce Commission rendered in Dry Goods, Piece Goods, Dependent on Value, 53 M.C.C. 157, or do statutory provisions give petitioner a cause of action to have the afore-

said order enforced and the right to damages as it relates to the shipments of dry goods and clothing moving from 1953 to 1960 on which a valuation charge was collected by respondent contrary to an order of the Interstate Commerce Commission? Your petitioner reads the statutes as allowing petitioner the right to have the order enforced and to recover damage from respondent for disobedience by respondent to an order of the Interstate Commerce Commission.

In support of that belief, your petitioner states that, it is provided in 49 U.S.C. 305(g), as follows:

> "Any final order made under this part (Motor Carrier Act and the Act under which the order and decision in 53 M.C.C. 157 were made) shall be subject to the *same right of relief in court* as it is now provided in respect to orders of the Commission made under Part I."

Part I is the Rail Carrier Act and Section 8 of 49 U.S.C. provides that petitioner is entitled to damages for the failure of respondent to comply with any provisions of Part I and under Section 16(12), 49 U.S.C. (Part I), compliance is required with the order the Commission issued requiring the cancellation in 1951 of the valuation charge. Petitioner has the right, under Section 16(12) of the Rail Carrier Act, 49 U.S.C., to apply to the District Court for enforcement of the order requiring the cancellation of the valuation charge and the neglect of the respondent to comply with the order the Commission entered in the Dry Goods Case, 53 M.C.C. 157 entitles petitioner to relief. Section 16(12) of 49 U.S.C. specifically provides that petitioner is entitled to relief as it provides that failure of a carrier to obey any order of the Commission, except

for payment of money, that "any party injued thereby may apply to any district court of the United States * for the enforcement of such order."

Had petitioner filed two separate actions in the District Court, one for enforcement of an order of the Commission and the other for damages for exacting higher rates at Lynchburg than at more distant points, then the T I M E Case would not have affected the action for enforcement of an order of the Interstate Commerce Commission.

Section 1336 of 28 U.S.C. provides that the district court shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul, or suspend in whole or part any order of the Interstate Commerce Commission. This section allows petitioner to enforce the order the Interstate Commerce Commission entered in the Dry Goods Case, 53 M.C.C. 157 and that fact clearly shows that the T I M E Case is not controlling, which latter case the District Court used to deny relief to petitioner, which relief arises under the order of the Commission requiring cancellation of the valuation charge. The Court of Appeals affirmed the judgment of the District Court. This petition is directed solely to the issue of whether or not enforcement of an order of the Interstate Commerce Commission can be had and relief granted as provided in 49 U.S.C. 8, 49 U.S.C. 305(g) and 49 U.S.C. 16(12).

Petitioner believes that a denial of the petition for writ of certiorari will be tantamount to granting respondent the right to exact and keep for itself known unlawful charges, contrary to law and to a decision and order or the Interstate Commerce Commission finding, in 1951, the valuation charge on dry goods and clothing unjust and unreason-

able for application on shipments moving subsequent thereto and entered an order requiring respondent to cancel, in 1951, the valuation charge. Had respondent complied complied with the decision and order of the Interstate Commerce Commission in 53 M.C.C. 157, petitioner would not have been damaged, as the valuation charge would not have been exacted.

WHEREFORE, petitioner respectfully prays that the writ of certiorari be granted as sought.

Respectfully submitted,

LYNCHBURG TRAFFIC BUREAU

By: W. G. BURNETTE,
Counsel

CERTIFICATE OF COUNSEL

I, W. G. Burnette, counsel for petitioner, hereby certify that the petition for rehearing is presented in good faith and not for delay. Counsel further avers that the petition is restricted to the grounds above specified.

W. G. BURNETTE

CERTIFICATE OF SERVICE

I, W. G. Burnette, attorney for Petitioner, hereby certify that I have this 24 day of March, 1963, served a copy of the foregoing document upon the respondent by mailing a copy thereof to Bryce Rea, Jr., 919 Munsey Building, Washington 4, D. C., counsel for Respondent.

W. G. BURNETTE